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DR COLIN LEE SOON SOO

v.

MAJLIS PERUBATAN MALAYSIA

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2(R4)-25-279-2009]
10 MAY 2010

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ADMINISTRATIVE LAW: *Remedies - Exhaustion of remedies - Decisions made during course of an administrative body's proceedings not to be challenged until proceedings are completed - Application to quash decision of Malaysian Medical Council (MMC) in dismissing applicant's preliminary objection - MMC yet to exercise disciplinary jurisdiction under*

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ss. 29 and 30 of Medical Act 1971 - Full inquiry yet to take place - Application for judicial review premature - Applicant must exhaust remedies available under Medical Act 1971

PROFESSIONS: *Medical practitioners - Preliminary investigation committee inquiry - Malaysian Medical Council (MMC) dismissing applicant's preliminary objection - MMC yet to exercise disciplinary jurisdiction under ss. 29 and 30 of Medical Act 1971 - Full inquiry yet to take place - Whether application for judicial review premature - Whether applicant must exhaust remedies available under Medical Act 1971*

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The applicant received a letter from the respondent informing him that a complaint had been lodged against him by Dr. Wan Mazlan, the Secretary of the respondent. The applicant was also notified that an inquiry before the Preliminary Investigation Committee II ("PIC"), convened by the respondent under reg. 26 of the Medical

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Regulations 1974 to investigate the complaint would be held. At the hearing of the Inquiry, it appeared that the complaint had been brought by Dr. Mazlan on behalf of the respondent and not in his personal capacity. In view of the fact that the respondent was the true complainant, the applicant objected to the proceedings on the

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ground that they were against the principles of natural justice. However, the applicant was informed by the Chairman of the PIC that the respondent itself had considered and rejected the applicant's Preliminary Objection, and directed the PIC to proceed with the inquiry ("the respondent's decision"). No grounds of decision for

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the dismissal of the Preliminary Objection were given. The applicant

therefore requested for the inquiry to be adjourned pending an application to court for judicial review against the respondent's decision. The applicant claimed that the respondent was the Complainant, Judge, Jury and Executioner and therefore there can be no fair and unbiased hearing for the applicant. The respondent argued that this application was premature as the respondent had not completed its investigation.

Held (dismissing the application for judicial review with costs):

(1) The application for judicial review was premature because until the Council exercised its disciplinary jurisdiction under ss. 29 and 30 of the Medical Act 1971 ('the Act'), the Council cannot be said to have assumed its disciplinary jurisdiction under the Act. The full inquiry had not taken place and therefore no decision had been made whether to frame a charge or not. Therefore, the applicant had not been adversely affected by any decision made by the respondent which was amenable to judicial review by the court. (para 11)

(2) As a general rule, absent of jurisdictional issues, decisions made during the course of a tribunal and/or an administrative body's proceedings ought not to be challenged until the proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary as a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such applications can bring the administration of justice into disrepute. (para 13)

(3) Relief may be refused on the ground that a litigant has not taken advantage of a right of appeal to an administrative tribunal when this is an adequate alternative remedy to an application for judicial review, even when the ground of review is the wrongful denial of a participatory right in breach of the duty of fairness or even a substantive jurisdictional error. (para 15)

(4) The applicant would not suffer serious hardship and unfairness if it was required to continue before the PIC without having the questions raised in his application resolved. Even if the respondent erred in dismissing the Preliminary Objection, that error may not affect the outcome of the complaints. (para 17)

(5) The respondent has its own procedures as set out in the Medical Regulations 1974 and by adhering to the same is sufficient and does not amount to a breach of natural justice. (para 17)

Case(s) referred to:
Air Canada v. Arthur E Lorenz and the Attorney General of Canada (10 September 1999), T-2463-97 ***(refd)***
Dr Chua Kaw Bing v. Majlis Perubatan Malaysia [1997] 1 LNS 225 HC ***(refd)***
Hj Ali Hj Othman v. Telekom Malaysia Bhd [2003] 3 CLJ 310 ***(refd)***
In Re Danmor Co Ltd [1974] 1 FC 22 ***(refd)***
Lembaga Jurutera Malaysia v. Leong Pui Kun [2008] 6 CLJ 93 FC ***(refd)***
R v. Richarmond Justices [1860] 24 JP 422 ***(refd)***
Tan Hee Lock v. Commissioner for Federal Capital & Ors And Another Case [1973] 1 LNS 152 ***(refd)***

Legislation referred to:
Medical Act 1971, ss. 29, 30, 31
Medical Regulations 1974, regs. 26, 29, 33
Rules of the High Court 1980, O. 53

For the appellant - Nurulhuda Mansor; M/s Shearn Delamore & Co
For the respondent - WA Shashila; M/s Ramrais & Partners

Reported by Amutha Suppayah

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This case concerns an application by the applicant for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari*, *inter alia*, to quash the respondent's decision dated 17 July 2009.

[2] The respondent has argued that this application is premature as the respondent has not completed its investigation.

[3] After considering the submissions filed by both parties, the court held that this application was prematurely brought before this court and dismissed the application with costs.

Factual Background

[4] The following facts are not in dispute:

(a) On 3 June 2008, the applicant received a letter from the respondent informing him that a complaint had been lodged against him by Dr. Wan Mazlan bin Mohamed Woojdy, the Secretary of the respondent. The applicant was also notified that an inquiry before the Preliminary Investigation Committee II ("PIC"), convened by the respondent under reg. 26 of the Medical Regulations 1974 to investigate the complaint would be held on 4 July 2008.

(b) At the hearing of the inquiry on 4 July 2008, Dr. Mazlan was absent and the respondent was instead represented by its Assistant Secretary, Dr. Muhammad Yazuran Salij bin Mohd Yasin. Dr. Yazuran's presence and testimony on that date made it clear that the complaint had been brought by Dr. Mazlan on behalf of the respondent and not in his personal capacity.

(c) In view of the fact that the respondent is the true complainant, the applicant objected to the proceedings on the ground that they were against the principles of natural justice. The proceedings were adjourned to enable the applicant to put forward written submissions.

(d) Subsequently, the applicant forwarded to the respondent a written submissions dated 9 September 2008 and a Bundle of Authorities to support the applicant's objection.

(e) On 15 May 2009, the applicant received a letter from the respondent informing him that the inquiry is fixed for continuation on 17 July 2009.

(f) On 17 July 2009, the applicant attended the inquiry before the PIC. Dr. Mazlan was absent and was again represented by Dr. Yazuran. On this date, Dr. Yazuran had once again introduced himself as the Assistant Secretary of the respondent.

(g) The applicant was informed by the Chairman of the PIC that the respondent itself had considered and rejected the applicant's Preliminary Objection, and directed the PIC to proceed with the inquiry ("the respondent's decision").

(h) No grounds of decision for the dismissal of the Preliminary Objection were given at that time, nor were any materials considered by the respondent in forming their decision forwarded to the applicant.

(i) The applicant therefore requested for the inquiry to be adjourned pending an application to court for judicial review against the respondent's decision.

Applicant's Submission

[5] The crux of the applicant's submission is that the decision referred to by the applicant is in fact the respondent's decision in dismissing the applicant's preliminary objection on breach of the principles of natural justice. This decision was notified by the PIC to the applicant. Hence, this application is certainly not premature since the respondent has already made a decision.

[6] According to the applicant, decided cases have ruled that an objection on bias is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. To support his submission, learned counsel for the applicant cited the case of *R v. Richarmond Justices* [1860] 24 JP 422 where it was held that an application for *certiorari* had to specify in his affidavits that neither he nor his advocate know of the objection at the time of the hearing or acquiesced in it.

[7] Here, the respondent is the complainant, judge, jury and executioner. There can be no fair and unbiased hearing for the applicant. It is therefore at this stage that this objection should be raised. The objection was raised and was dismissed by the respondent. The entire proceedings by the respondent are fundamentally flawed as they are in violation of the principles of natural justice, and the respondent had acted without or in excess of its jurisdiction.

Respondent's Submission

[8] The main argument of the respondent is that the application for judicial review is premature on the following reasons:

(i) The PIC of the respondent has barely proceeded with the inquiry and neither has it completed its investigation under reg. 29 of the Medical Regulations 1974;

(ii) The PIC has not been able to investigate the allegations against the applicant and hence has not deliberated and/or decided on the matter;

(iii) The charge has not been framed against the applicant and neither has he been found guilty;

(iv) Since the PIC has not been completed, there is no possibility of the applicant positively identifying the state of mind of the complainant to reach any sort of conclusion on impartiality or fairness on the part of the PIC.

[9] To support his submission, learned counsel for the respondent cited the case of *Dr. Chua Kaw Bing v. Majlis Perubatan Malaysia* [1997] 1 LNS 225; [1997] 5 MLJ 599.

[10] Further, after the completion of the inquiry proceedings, the applicant is still allowed to appeal against any decision and/or order at that point in time, if he considers the same to be unfavourable to him.

Findings Of The Court

[11] The respondent first and foremost submits that this application for judicial review is premature because until the Council exercises its disciplinary jurisdiction under ss. 29 and 30 of the Medical Act 1971 (the Act), the Council cannot be said to have assumed its disciplinary jurisdiction under the Act. The full inquiry has not taken place and therefore no decision has been made whether to frame a charge or not. Therefore, the applicant had not been adversely affected by any decision made by the respondent which was amenable to judicial review by this court. I agree.

[12] It is obvious that the decision sought to be reviewed is the respondent's decision directing the PIC to proceed with the inquiry. The PIC has yet to investigate and consider the complaint because the applicant raised a Preliminary Objection that the PIC should not hear the matter on the ground that the proceedings were against the principles of natural justice. The PIC forwarded the applicant's objections and/or submissions to the respondent who decided the matter could proceed before the PIC and directed the PIC to do so. The decision was made by the respondent during the course of the PIC's proceedings.

[13] It is well established that as a general rule, absent of jurisdictional issues, decisions made during the course of a tribunal and/or an administrative body's proceedings ought not to be challenged until the proceedings have been completed. The rationale for this rule is that such applications for judicial review may ultimately be totally unnecessary as a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such applications can bring the administration of justice into disrepute.

[14] The Federal Court of Appeal of Canada in *Re Anti - Dumping Act and In Re Danmor Co. Ltd* [1974] 1 FC 22, had this to say as p. 34:

> ... a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal.

[15] In *Air Canada v. Arthur E. Lorenz and the Attorney General of Canada* (10 September 1999), T-2463-97, Evans J refused to make a determination on an allegation of bias against an adjudicator in an unjust dismissal claim before the adjudicator had rendered a final decision:

> [13] As a general rule, it is such more difficult nowadays for a litigant to persuade a court to intervene before the applicant has exhausted the available administrative remedies than it was when *Bell v. Ontario (Human Rights Commission)* [1971] SCR 756 was decided.
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> [14] Thus, relief may be refused on the ground that a litigant has not taken advantage of a right of appeal to an administrative tribunal when this is an adequate alternative remedy to an application for judicial review, even when the ground of review is the wrongful denial of a participatory right in breach of the duty of fairness (*Harelkin v. University of Regina* [1979] 2 SCR 561), or even a substantive jurisdictional error (*Canadian Pacific Limited v. Matsqui Indian Band* [1995] 1 SCR 3).
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> [15] Courts are similarly reluctant to intervene to review an interim or interlocutory decision prior to the conclusion of the proceeding before the administrative tribunal. There are a number of cases in which relief has been refused when the applicant has challenged the

> proceeding of a human rights tribunal prior to its rendering a final decision, including some involving allegations of bias: see, for example, *Ontario College of Art v. Ontario (Ontario Human Rights Commission)* [1992], 99 D.L.R. (4th) 738 (Ont. Div. Ct.).
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> [...]
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> [18] .... the exercise of the Court's discretion here turns principally on a weighing of two competing considerations. On the one hand are the possible hardships caused to air Canada, and the time and resources that will have been wasted, if the bias question is not determined prior to the completion of the proceeding before the adjudicator. On the other hand, there are the adverse consequences of delaying the administrative process and of countenancing a multiplicity of litigation.

[16] I would associate myself with the view that applications for judicial view, especially immediate review of decisions in the course of proceedings of tribunals or administrative bodies, like the instant case, should be discouraged. Such restraint will prevent a plethora of immediate reviews and the delays which inevitably flow from them. It would also permit a fuller view of the issue by the reviewing court which will have the benefit of a more complete picture of the evidence and the case.

[17] To my mind, I do not think the applicant would suffer serious hardship and unfairness if it was required to continue before the PIC without having the questions raised in his application resolved. Even if the respondent erred in dismissing the Preliminary Objection, that error may not affect the outcome of the complaints. If the applicant ultimately successful, this application will have been unnecessary. The PIC may dismiss the complaint if it finds insufficient grounds to support the charge. Alternatively, if the PIC does frame a charge, it still affords the applicant an opportunity for the applicant to defend himself and there can be a recommendation by the PIC after hearing the applicant in defence, that no action be taken. Subsequently, even if it does decide to recommend to the respondent that action be taken, the respondent still have to go through the record of proceedings and come to a decision. It is evident from this whole inquiry process that the Medical Act and its regulations have put in place internal mechanism to regulate its own proceedings. Statutory safeguards are also entrenched under reg. 33 of the Medical Regulations 1974 which prohibit any

member of the respondent or the PIC to participate in any of its meetings. Therefore, the issue of biasness and impartiality has already been addressed by the respondent under reg. 33.

[18] Alternatively, if the applicant is unsuccessful, he can bring an appeal under s. 31 of the Act to the High Court against the respondent's decision. At that time, the court can consider the importance of the applicant's Preliminary Objection and the alleged error of the respondent in rejecting the Preliminary Objection and any denial of natural justice which he may have suffered. Therefore, there is some other appropriate remedy available to the applicant for any possible error of the respondent in this matter.

[19] On the evidence before me, it is clear that the internal decisions making procedures have not been exhausted and the "ultimate decision/order" of the Council on the complaint is unknown. It is not for this court to speculate upon the outcome of such investigation might be.

[20] I agree with the submission of learned counsel for the respondent that in this instant case, it is even more pre-mature than the fact in a *Dr. Chua*'s case *(supra)*. In *Dr. Chua*'s case, the PIC proceeded with the inquiry and framed a charge against the doctor, whereas in this instant case, the full inquiry has not taken place and no decision has been made whether to frame a charge or not.

[21] The learned judge in *Dr. Chua*'s case stated clearly at p. 599 para E:

> The law does not prohibit the committee from seeking advice from the Council; neither is the Council prevented from tendering advice to the Committee in respect of this inquiry.

This exactly what the P.C. sought to do when it received the preliminary objection from the applicant and that is exactly what the respondent did when it directed the PIC to continue with the inquiry.

[22] It should be emphasized that the respondent has its own procedures as set out in the Medical Regulations 1974 and by adhering to the same is sufficient and does not amount to a breach of natural justice.

[23] In *Tan Hee Lock v. Commissioner for Federal Capital & Ors And Another Case* [1973] 1 LNS 152, Gill FJ (as he then was), delivering the judgment of the then Federal Court said: A

> it is clear from the authorities that natural justice does not mean that a person performing an administrative or ministerial act must follow the procedure of a court of law or adopt procedure analogous to that of a court of law. B

[24] Gopal Sri Ram JCA (as he then was) in the case of *Hj Ali Hj Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310 adopted the view expressed by L'Heureux-Duke' J in the Supreme Court of Canada in *The Board of Education of the Indian Head School v. Knight*: C

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. D

[25] Nik Hashim FCJ delivering the judgment of the Federal Court in the case of *Lembaga Jurutera Malaysia v. Leong Pui Kun* [2008] 6 CLJ 93 also adopted to the view expressed in the case of *Haji Ali bin Haji Othman v. Telekom Malaysia Berhad (supra)*. E

[26] The respondent submits a lengthy submission on the two grounds to support the application for judicial review, which are: (i) breach of natural justice; and (ii) the respondent had acted without or in excess of its jurisdiction. However, I do not consider it necessary and even appropriate to dispose of any other issue in this matter, given my conclusion that the application for judicial review is premature. Consequently, I do intend to undertake the judicial review sought by the applicant. To do so would effectively be to engage in the analysis that another judge of the High Court may at a later date be required to take. F G

Conclusion

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[27] For all the above reasons, I find that the application for judicial review must be dismissed with costs on the ground that it is premature.

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